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In The

SUPREME COURT OF THE UNITED STATES

————Term, 1942

MASSACHUSETTS BONDING & INSURANCE COMPANY,
Petitioner.

VS.

MRS. E. S. MASSEY, ET AL, *Respondents*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINIONS OF THE COURT BELOW.

I.

This case was tried before a jury, hence there was no opinion of the District Court reported. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit rendered on appeal is dated November 19th, 1941, and is found in the record at page 166, and is also reported in the Advance Sheets, 123 Federal Reporter (2) 447 to 449, inclusive.

II.

JURISDICTION

1. The date of the judgment to be reviewed is November 19th, 1941 (record, pp. 166-171). Motion for rehearing was filed under order extending time (record, page 172 for order, page 173 for petition for rehearing). Order denying rehearing was made without written opinion January 12th, 1942 (record, page 181). The amount sued for was 360 weeks at $20.00 per week, or $7,200.00, and jurisdiction of the lower court was obtained by reason of the amount involved and diversity of citizenship, as alleged by petitioner (record, page 2); such diversity of citizenship is admitted, paragraph 4 of answer of respondent below (record, pp. 6 & 7).

2. Respondent alleged as a cause of action that Massey strained, over-exerted, and tore himself on August 31st, and that on November 15th he injured and strained himself and aggravated previous injuries, and on November 28th he further injured himself by working, and aggravated his previous injuries, and that near noon of November 29th, 1939, he died of syphilitic heart failure.

Relator denied by its answer that the facts alleged constituted a case, and it particularly now says that the facts proved do not show that the deceased received a compensable injury under the Texas Workmen's Compensation Act and the cases as decided by our courts.

Under the new rules, the pleadings make little difference. It is the evidence that the courts must look to, and it shows, as we will set out more fully hereafter, that on August 31st deceased did nothing that strained or injured him, and he complained only of being tired and uncomfortable that night, and the evidence shows that his heart was then in such condition that on the following day one of the neighbors standing at the foot of the bed was disturbed by the noise made by the leaky valves of his heart. The proof will show that on November 15th, the next date alleged, that Massey did not so much as raise his hands. He merely assisted in giving some orders, and did not work at all, and had no opportunity to strain himself, and that on November 28th, while he was up until some 11:30 that night, and was out early the next morning, there was no proof of any over-exertion or strain or any untoward accident of any kind.

At the close of the evidence petitioner requested a preemptory instruction in its favor, which was denied, and petitioner excepted thereto (record, page 148).

Petitioner particularly requested that the jury be instructed not to consider the incidents happening August 31st, and what was known as the cooler incident, which was the day's work he alleged he suffered from about November 15th, and the charge was excepted to because same failed to limit the jury in their consideration to the events of the 28th and 29th only, and in failing to exclude August 21st and November 15th (see record, page 154, top

page 155). The judgment of the lower court was affirmed by the Circuit Court of Appeals (record, pp. 166-170) and rehearing was denied (record, pg. 181).

The holding of the Circuit Court of Appeals which we now complain of is in substance contained in the quotations from the opinion, as follows:

> "We cannot agree with appellant. It is well settled that the Texas Workmen's Compensation law does not cover death solely from disease, occupational or otherwise, but only death or other disability, physically resulting from exertion or other work activities, connected with his employment. . . . . ..
>
> . . . Appellant's argument seems to be very much like that which was advanced, but did not prevail, in the Brodtmann case, supra, that there must be direct evidence that the death was caused by, that is connecting the death with, a particular exertion or activity. This will not do. It is sufficient if taking all the facts and circumstances, there is a reasonable basis for the conclusion that in the course of his employment, there was an exertion, the accidental and unlooked for result of which was a physical injury to his heart causing its failure and his death.
>
> . . . The Workmen's Compensation Act contains no words excluding from the benefit of its provisions employees who are weak or sick. Such employees are as fully protected under the act from death or disabilities caused by injuries received in the course of their employment as are employees who are entirely well and strong. The only thing the act requires is that the death or injury for which compensation is sought be shown to be wholly or partly the result of some

work or activity connected with the employment, and not mere result of disease, which operating in its ordinary and natural course and without regard to the employment and its activities brings about his death.
* * * *

The evidence in this case was sufficient to support such a conclusion. The motion for an instructed verdict was properly denied. Appellant's other assignment that there was error in permitting evidence of the claimed injuries in August and November is without merit. This is so both because the evidence came in without objection and because if it had been objected to, it was admissible and relevant upon the issue of plaintiff's condition and the effects upon the heart of the exertions required by his employment."

3. Jurisdiction is invoked under Title 28, Section 347, United States Code Annotated:

"(a) That in any case civil or criminal, . . . it shall be competent for the Supreme Court of the United States upon petition of any party thereto . . . to require by certiorari, either before or after judgment or decree by such lower court, that the case be certified to the Supreme Court for determination by it, with the same power and authority, and with like effect as if it has been . . . .

(b) . . .

(c) No judgment or decree of a Circuit Court of Appeals, ... shall be subject to review by the Supreme Court otherwise than ~~subject to review by the~~ as provided in that section."

Cases pertinent under the first reason relied on for allowance of the writ. (We divide this into three parts): (1)

accident; (2) time and place; and (3) hazards greater than to which the general public is exposed:

(1) Accident:

Article 8309, Sec. 1, Subdv. 5, R. C. S.; (see pg. hereof for quotation);

Middleton vs. Texas Power & Light Co., 108 Texas 98-109; 185 S.W. 556;

Gordon vs. Travelers Insurance Company, 287 S.W. 911;

Travelers Insurance Company vs. Lancaster, 71 S.W. (2) 318;

Barron vs. TEIA, 36 S.W. (2) 464;

United States Casualty Co. vs. Vance, 91 S.W. (2) 465;

Choate v. Hartford, 54 S.W. (2) 901, (writ refused) and the many cases cited.

(2) Time and Place:

Southern Casualty Company vs. Flores, 1 S.W. (2) 260;

Odom vs. Indemnity Insurance Company, 111 S.W. (2) 1143 (par. 5, pg. 1146, to close);

Consolidated Underwriter vs. Christal, (writ refused), 35 S.W. (2) 127.

(3) Hazards Greater than to which the General Public is Exposed:

Southern Casualty Company vs. Flores, 1 S.W. (2) 260;

Fidelity & Casualty Company of New York vs. Neas, 93 Fed. (2) 137.

III.

STATEMENT OF THE CASE

Under the new rules the liberal admission of testimony makes it necessary, we think, to look to the basis of the proof rather than the pleadings. The three incidents, events, or accidents relied on by relators were (1) the day of August 31st, (2) the day the cooler was installed, about November 15th, and (3) the day of November 28th. At each of these instances there was only one witness present. Relator's witness, Lawson, was present the day of August 31st. The following testimony by Lawson is pertinent that no strain or injury of any kind happened:

"Q. You have done many days' work where the work was infinitely heavier and harder than it was there, haven't you?

A. I have done some heavier, and I have done some that was not so heavy.

Q. Sometimes you didn't do anything hardly, did you, but you had done, on many leases, you have done many times heavier work than occurred out there that afternoon?

A. I have done heavier work than that.

Q. Now, there was not a complaint or a thing in the world said by Skeet Massey that afternoon that would indicate to you that he had an injury in any way in the world, was there, until after you got to the house, and that would not indicate it?

A. Well, just saying he was petered out.

Q. What is that?

A. The only thing I heard him complain about was that afternoon when we stopped after we had signed the time sheet.

Q. And he merely told you that he felt like he had put in a day?

A. Yes, sir.

Q. And was tired, or something like that?

A. Yes, sir.

Q. And down there during the whole afternoon, he had not complained to you a word of any kind or character, did he?

A. He sat down under—

Q. In the shade a little bit, to cool?

A. Yes, sir.

Q. Now, that was some little bit after he carried the joint that you thought maybe was heavier, wasn't it?

A. I don't remember.

Q. You just remember he sat down a little while that afternoon?

A. Yes, sir.

Q. During that afternoon, there was not a thing in the world to call your attention in any way, that there was any difference in that and any other half a day's work you ever did?

A. No, sir, just common old work.

Q. Just common everyday work?

A. Yes, sir."

Relator's witness, Ballowe, was the only one who testified as to the cooler incident, and he says (record, page 65):

All Massey did on the cooler was to direct the work.

Mrs. Massey said (record, page 81):

"Q. Did Mr. Massey assist, or at least on the job and supervising that job?

A. Well, he was out on the job, but I was not out there.

Q. You do know he was out on the job?

A. Yes, sir."

And on the third incident, the day of the 28th and the morning of the 29th of November, Ballowe was the man hired to do the work, and the only one present, and he testified (record, page 67):

"Q. But ordinarily you do not have to turn it (the engine) over, do you?

A. No, sir.

Q. As long as you stayed there he didn't help you any to speak of?

A. Yes, sir, he helped me some but not much.

Q. You didn't see him do anything there that night *before you left that would have strained him*, did you?

A. *No, sir.*"

(middle of page 68, record):

"Q. Now when you left at 11:15

(the engine was up and running)

he just merely told you that he thought he would stand around a little while longer?

A. Yes, sir."

He goes on just following this to say the engine had been running thirty minutes when he left, and that he stayed long enough that he thought there was not anything going to happen to the engine.

"Q. After it had been running nicely that long you assumed it was probably out of the woods, as we say, and you went home?

A. Yes, sir.

Q. In other words, you were the man hired to do the work down there?

A. Yes, sir.

Q. And did it?

A. Yes, sir."

Ballowe says, record page 113:

> "Q. I believe I asked you yesterday with regard to Massey, and he did no work that night (the night of the 28th), except directing you, to speak of?
>
> A. No, sir."

The record shows (page 128) the leak in the valves of his heart, on first seeing the doctor, "was then liable to destroy him any moment." Page 130 of the record, the doctor said:

> "He (Massey) was ripe for death, work or no work, and nobody could say that the work he did or did not do caused it, and be definite about it."

He further says that in death (record, pp. 130-1) there was no damage to the heart, that it simply failed. He further said:

> "Q. Now this disease (syphilitic heart failure), Doctor, takes a definite, set course as to its damage, and unless response to treatment is had early, the probabilities are that it will go straight through to death?
>
> A. That is true, absolutely correct.
>
> Q. And this man, for proper medical response and treatment, came to you to late, didn't he?
>
> A. Yes, sir."

Massey's heart was in such condition that when a friend visited him on the second day after August 31, he testified (record, pg. 70) that he stood at the foot of the bed and heard the blood from his heart gurgling and sloshing.

IV.

SPECIFICATION OF ERROR.

1). The Honorable Circuit Court of Appeals erred in holding that an injury, to be compensable under Texas Workmen's Compensation law, did not have to result from accidental injury definitely located as to time and place, but that death or injury was compensable if such injury "resulted from exertion or other work, activities connected with his employment."

2). The Honorable Circuit Court of Appeals erred in holding that it was not necessary "that there be direct evidence, that the death was caused by, that is, connecting the death with, a particular exertion or activity," because the Texas Courts hold that time and place of injury must be definitely shown.

3). The Honorable Circuit Court of Appeals erred in holding that you can choose any three unrelated days, a six weeks period between each event or day chosen—and where all of the days' work of a pumper are as much alike as peas in a pod—, and from these three days and incidents occurring on such days, with nothing in particular in the way of strain or exertion to mark them off from the other days that he had worked for a period of several years before, and six weeks after the first of such incidents, and allow a recovery for such incidents on the theory that the plaintiff had shown that he had a strain sufficient to constitute an accidental injury, one which was located suf-

ficiently as to time and place as distinguished from all of the other days that such pumper worked.

4). The Honorable Circuit Court of Appeals erred in holding that where syphilis has destroyed the valves of the muscles and the heart so that deceased was ripe for death, work or no work, and was injured from his disease to such an extent that "even to interfere with his rest" was in effect an invitation to death, and that where the deceased had done the same kind of work for years before the day charged, and after a rest period of a few weeks he continued the same kind of work for a month and a half to his death, and the witnesses say that on the three days chosen there was no particular strain or exertion that they saw or heard deceased complain of so as to mark it off from the other days he worked, and the court under such circumstances allowed Massey's beneficiaries to choose three days and incidents in those days that could not be differentiated from other days, and choosing these particular days and incidents, allow the respondent to recover, because such is contrary to our statutes and the settled law of the State of Texas, as is decided on *Odom vs. Indemnity Insurance Company*, 111 S.W. (2) 1143, and contrary to all the decisions of our courts holding that such accidents must be traced to a definite time and place.

5). The Honorable Circuit Court of Appeals erred in holding:

> "It is sufficient, if taking all of the facts and circumstances, there is reasonable basis for the conclu-

sion that in the course of his employment, there was an exertion, the accidental and unlooked for results of which a physical injury to his heart, causing its failure and his death."

6). The Honorable Circuit Court of Appeals erred because the holding in this case pyramids one presumption upon another in this: Our courts hold, *Southern Casualty Company vs. Flores:*

> *"Actual, physical injury, external or internal, must be shown in a proper way before an inference legally may be drawn that the final result is attributable to an injury originating in the employment."*

7. The Honorable Circuit Court of Appeals erred in holding that in case of injury from strain or exertion while working, that in order to recover, the injured party or his beneficiaries must show that his exposure to injury by strain and exertion was greater than that to which the general public was exposed.

8). The Honorable Circuit Court of Appeals erred in holding that the testimony covering the work of August 31st and November 15th was admissible, and in holding that the lower court was correct in refusing to instruct the jury not to consider same, as requested by relators.

V.

ARGUMENT

SUMMARY OF ARGUMENT

POINT A:

The decision of the Honorable Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of Texas in holding that it is not necessary for the injured party or his beneficiaries to show, in order to recover compensation, that he suffered an accidental injury that could be definitely located as to time and place, but that death or injury was compensable if such injury "resulted from exertion or other work activities connected with his employment." (See Specifications of Error, 1 & 2).

POINT B:

The decision of the Honorable Circuit Court of Appeals is in conflict with the decisions of our Texas Supreme Court in holding that three days work, scattered over a period of three months, and undistinguished from the work of other days, might constitute such strain as would be compensable under the Texas Workmen's Compensation laws. (See Specifications of Error 3 & 4).

POINT C:

The decision of the Honorable Circuit Court of Appeals holding:

> "It is sufficient, if, taking all of the facts and circumstances, there is reasonable basis for the conclu-

> sion that in the course of his employment, there was an exertion, the accidental and unlooked for results of which was a physical injury to his heart, causing its failure and his death",

is in direct conflict with the holdings of our Texas Supreme Court, in holding, in effect, as set out above, that the injury did not have to be accidental at all, but it was sufficient if he worked and there were unlooked for results from his work. (See Specification of Error 5).

POINT D:

The decision of the Honorable Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of Texas holding that you cannot pile presumption on presumption, which is the established law in Texas by the case of *Joske vs. Irvine*, 95 Texas 574, 44 S.W. 1059, as applied to compensation case in *Southern Casualty Co. vs. Flores*, 1 S.W. (2) 260. (See Specification of Error 6).

POINT E:

The decision of the Honorable Circuit Court of Appeals is in direct conflict with the decisions of our Texas Supreme Court in *Southern Casualty Company vs. Flores*, 1 S.W. (2) 260, holding that it must be shown that the employee's exposure to strain and exertion must be greater than that to which the general public is exposed.

POINT A.

The facts pertinent to this discussion are practically undisputed. As to the first day charged as to his injuries, to-wit, August 31st, his neighbor and his witness testified (record pg. 41).

> "Q.Now there was no complaint nor a thing in the world said by Skeet Massey that afternoon that would indicate to you that he had an accident in any way in the world, was there, until after you got to the house, and that would not indicate it?
>
> A. Well, just saying he was petered out."

Likewise his neighbor and witness, Ballowe, who gave testimony as to the cooler incident (record, page 65), testified:

> "Q. Now, when you were working on the cooler, about all that Massey did was to direct the work, give orders, wasn't it?
>
> A. Yes, sir . . ."

and his wife admitted she was not there. And again Ballowe, his helper, his neighbor, and relator's witness said (record, page 67) referring to the day and night of the 28th:

> "Q. As long as you stayed there he did not help you any to speak of?
>
> A. Yes, sir; he helped me some, but not much.
>
> Q. You did not see him do anything there that night before you left that would have strained him in any way, did you?

A. No, sir."

and he says (record, 133):

"Q. I believe I asked you yesterday with regard to Massey, and he did no work that night (the night of the 28th) except directing you, to speak of?

A. No, sir."

This record shows that this man had been a pumper for approximately ten years. It shows, according to his physician, that he had syphilitic heart failure for a period of from three to ten years. It shows that on the first he complained of being injured was, August 31st, and that he carried a few joints of pipe and did some connecting. The other two days or incidents relied on, about November 15th, and the last day before he died, he did nothing practically except direct the work. We have only the evidence of his neighbors and his wife, who were doing their utmost to help her recover. We submit that the Record shows that there was not a thing untoward, unusual or accidental in this record, and that there was no strain. At least there is not one single thing that we can see in this record that would indicate that Massey had more of a strain on any of these days than he had on any other day that he worked, and concededly he ran the outfit as pumper for the last six weeks before he died, and had been running it years before, and his own doctor testified that he was ripe for death every day, work or no work.

Our courts have said in the Flores case, cited herein:

> "The Workmen's Compensation law does not provide for health or accident insurance, and because it does not go that far, Flores' death must be regarded as being beyond its reach,"

and we submit that the Flores case, by our Supreme Court, is identical with this case in all of its particulars.

Subdivision 5 of Section 1, Art. 8309, R. C. S., is as follows:

> The terms "injury" and "personal injury" shall be construed to mean damage or harm to the physical structure of the body and such diseases or infections as naturally result therefrom.

This has been repeatedly construed by our Supreme Court to cover accidental injury only which may be located definitely as to time and place.

We find that Judge Phillips, a distinguished jurist of our Supreme Court, Chief Justice for a number of years, laid down the doctrine that the injury must be accidental in *Middleton vs. Texas Power & Light Company, supra,* and even bases the constitutionality of the act upon the fact that it was limited to accidental injury. Some of the opinions point out that the court reached the accidental conclusion from the fact that the caption of the act referred to accidental injuries, and it has also been discussed that the prerequisite for notice was to be given so many days from the "happening" of the injury. As we see it, however, this court is not concerned with how our

Supreme Court reached its conclusion; suffice it to say that they have reached that conclusion.

In the Barron case, supra, it is said, after holding that it must be accidental injury, that

> "A distinguishing characteristic of an accidental injury is that it can always be traced to a definite time, place and cause."

You will find in the case of *United States Casualty Company vs. Vance, supra*, it is held that the courts have read into the statutory definition of injury the element of accident, and Judge Sibley, in the first case cited in the court below, *Fidelity & Casualty Co. vs. Neas*, 93 Fed. (2) 137, quoted himself and others in *Henderson vs. Maryland Casualty Company*, 62 Fed. (2) 107, wherein the court used the expression "accidental injury", describing it as

> "One occurring unexpectedly, not in the natural course of events, and must be capable of being traced to a definite time, place and cause."

In the Neas case the man had climbed a light pole, and had immediately ascended another pole, and coming down, he staggered backward when he got to the ground, slumped down, and was taken to a hospital, and died. Judge Sibley said:

> "In the present case Neas was required by his employment to climb poles, *involving an exertion far greater than the ordinary public would ordinarily undergo.* If that exertion *THEN AND THERE* caused a brain hemorrhage which would not otherwise

> have happened, there was an injury originating in the work from which the statute requires industry to make compensation."

As we see it, not only did the relator fail to show anything that would constitute an accident or a strain, but utterly failed to differentiate the work he did on any of these three days alleged from any of the other days that he worked. If the court is right in this opinion, then we must say that if Massey is injured, all of his work contributed to that injury, for all of his days required as great or greater effort than these three days. And if this is true, then it must follow that any man who has a damaged heart through his own fault, as Massey had, and if he works at anything, whenever he dies, under the law he will receive Workmen's Compensation insurance. The evidence shows that he had no physical damage to his heart, but that it merely failed, and that action of any kind might contribute to its failure. There is no case in Texas that can be pointed out as holding that such is a correct statement of the law.

POINT B.

The Odom case, supra, is to the effect that you cannot pick up various incidents, and add them together, in order to get an injury, and the Chrystal case, supra, quotes from 45 Tex. Jur. page 494, to the effect that compensation is allowed for injury.

> "resulting from strain, and those sustained where strain resulted in the bursting of a blood vessel, and

consequently appoplexy and death or partial paralysis where such injuries flowed from something *out of the ordinary and unexpected, and were definitely located as to time and place.* Whatever the physical condition of the individual may have been, if it was such that some physical exertion or strain was required to cause the rupture, the injury may be classed as an accidental one."

POINT C.

The holding here is, we think, not only one contrary to all of the Texas decisions, but so far as we have been able to find, prior to this there has been no authority that held that where, in line with his work,

> "There was an exertion, the accidental and unlooked for result of which was a physical injury,"

it was sufficient. We had always thought that results were not accidental, but here they take the accident away from the injury and make the result of a strain, if it is unlooked for, accidental.

If a man does only the ordinary work of his employment, and he chooses three particular days out of several years upon which to base his claim for injury, and there is no evidence that he ever complained on these three days of receiving a strain or extra exertion, and his witnesses and neighbors who testify for him testify that there was no such complaint, and that on the last two days complained of he merely directed the work and did nothing to strain himself, and the evidence shows that there is prac-

tically no difference in these days' work and the other days that he worked, then it must follow, we think, that where the evidence shows that he was afflicted with syphilitic heart failure and scheduled to die in a given period, if the holding in this case is correct then one who is so afflicted and is employed at all and dies from his affliction, must be paid compensation. The Compensation Laws of our State were not made, nor have they been interpreted so as to be given such construction. See the quotation set out above as the settled law from 45 Tex. Jur., page 494.

POINT D.

As the court so aptly points out in the Flores case, supra:

> The reasoning proceeds: (a) It is possible that the exertion caused some undisclosed "harm or damage to the physical structure of the body," although the same "harm or damage" may as well have occurred if Flores had been walking toward 228 Argyle Avenue in search of employment; therefore, some such "harm or damage" did occur. (b) Since "harm or damage" did occur, although its nature or degree is unknown, it caused or contributed to cause death. The basic data, it may be conceded, make up a scintilla of evidence; but so long as the doctrine of Joske vs. Irvine, 91 Texas 574, 44 S.W. 1059, remains in effect, the data cannot be regarded as evidence itself touching the important matter.
>
> "The Workmen's Compensation Law does not provide for health or accident insurance; and because it does

not go that far, Flores' death must be regarded as beyond its reach."

The court then goes into many cases, and at the middle of the next to the last column of the opinion the court concludes:

> "But in each of them it will be found there was evidence assumed to show actual injury to body or parts,"

then he sets out a long list of cases with some injury in each, and concludes:

> Whether the case in the two lines as last above discussed may be entire reconciled on principle, they all appear to proceed upon the theory *that actual physical injury, internal or external, must be shown in a proper way* before an inference legally may be drawn that the final result (in respect to which compensation is claimed) is attributable to an "injury" originating in the employment. And, as indicated, most, if not all, of the cases from other jurisdictions includes that postulate. In the present case there is absent the proof of "injury" which was actually or assumedly present in the other cases.

PART E.

Supporting our contention here, we must quote from the Flores case, supra, as follows:

> Syphilis and its resultant, of course, had no origin in the employment. Their presence in that degree which converted the slightest physical exertion into invitation to death being shown by evidence in which there is no contradiction, the case belongs to that

class in which the supposed "injury" comes "from a hazard to which the workman would have been equally exposed apart from the employment," and hence, is noncompensable.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that a writ of certiorari should be granted and that this Court should review the decision of the Circuit Court of Appeals and finally reverse the same.

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